No. 14,685

United States Court of Appeals

For the Ninth Circuit

DONALD OXFORD,
Appellant,

vs.

CARSON CONSTRUCTION CO., D. K. MACDONALD & COMPANY, and ALASKA INDUSTRIAL BOARD,
Appellees.

Appeal from the District Court for the District of Alaska, First Division.

BRIEF FOR APPELLEES CARSON CONSTRUCTION CO. AND D. K. MacDONALD & COMPANY.

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FACTS.

Donald Oxford, a heavily built single man of Fort Smith, Arkansas, was employed by the Carson Construction Co. as a carpenter in Juneau, Alaska, on September 4, 1951. He alleges that on that date at about 3:00 p.m. he, with another employee, lifted a 4″x12″x20′ light spruce screed, moving it about ten feet. After setting the screed down on some sawhorses, he said to his companion: "I had hurt my back." He did not consider himself as "hurt bad" and

he continued his regular employment until quitting time at 5:00 p.m. Next day he started work but complained of back pain and was sent to the doctor by his foreman.

In 1949, when employed by a different employer at Adak, Alaska, Oxford had injured his back while carrying a 16 ft. tank stave. A "puff of sudden dust" knocked the stave off his back, causing a jerk to his back and a subsequent back strain. His back was sore for four or five days after this incident.

Oxford's pattern of employment in the past was very irregular, and normally he worked approximately six months out of the year.

The employer, after the September 4, 1951 injury, paid Oxford temporary disability compensation at the rate of his high Alaska wages for the period from the date of his injury to November 15, 1951, in the amount of $1,106.00.

Dr. Duncan, an orthopedist of Seattle who examined Oxford, reported on October 19, 1951 that his disability should not exceed a few weeks from that date.

Subsequently, the insurance company authorized, at its expense, an operation for the excision of a lipoma in Oxford's back, the company expressly denying any further liability for the alleged injury of September 4, 1951.

After the lipoma removal, Oxford continued to complain of back pains. The symptoms, according to Dr. Hoge, did not indicate a ruptured disc, and x-rays

indicated the possibility of an old injury antedating the September 1951 incident as the cause of the disability (Tr. 29).

At the employee's instigation, he was operated on by doctors of the Veterans' Administration on March 11, 1953. A laminectomy and fusion was performed. No evidence of an old or recent fracture or of any dislocation was discovered. It was found that Oxford was suffering from a congenital unstable back and the x-ray evidence also indicated the presence of a pathological degenerative disc.

Dr. Martini, who operated on Oxford, did not believe that Oxford's condition, as found at surgery, was produced by the incident of September 4, 1951. "The degenerative disc would take five to ten years to develop and the loose vertebral segment could not be related to any injury." (Tr. 50-51.)

Subsequently, Mr. Oxford filed an application for adjustment of claim with the Alaska Industrial Board. After a hearing before the full membership of the Board, a finding was made that "applicant did not suffer injury arising out of and in the course of his employment." The decision denying compensation was appealed to the United States District Court for the District of Alaska and the case was remanded to the Board for more detailed findings. A new decision was then rendered by the Board setting forth in more detail the facts of the case, and concluding: "(1) Applicant suffered no accidental injury arising out of and in the course of his employment with the defendant, Carson Construction Co.

(2) Applicant's subsequent operation and disability were not attributable to any accidental injury arising out of and in the course of his employment with the defendant company." This decision was again appealed to the United States District Court for the District of Alaska, which learned court affirmed the decision of the Alaska Industrial Board, holding that there was substantial evidence to support the findings of the Board. It is from this decision of the United States District Court that this appeal has been taken.

ARGUMENT.

I.

THE FINDINGS OF THE ALASKA INDUSTRIAL BOARD THAT OXFORD DID NOT SUSTAIN AN INJURY ARISING OUT OF AND IN THE COURSE OF HIS EMPLOYMENT SHOULD BE UPHELD SINCE SUCH FINDING IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Counsel for appellant ignores one most important aspect of this case in his brief. The Alaska Industrial Board found that Oxford did not suffer an injury arising out of and in the course of his employment under the provisions of the Alaska Workmen's Compensation Act, and further found that any disability suffered by Mr. Oxford was not attributable to an injury arising out of and in the course of his employment with the defendant company. In appellant's brief, these findings of the Board in effect are completely ignored. From counsel's brief one would assume that the Board had found that Oxford had sustained an accidental injury arising out of and in the course of his employment.

Section 43-3-22 ACLA 1949 provides in part: "An award by the full Board shall be conclusive and binding as to all questions of fact." The Board, in the subject case, has found that Oxford did not sustain an injury arising out of and in the course of his employment with Carson Construction Co. The law in regard to appeals from a Board's findings is set forth in Larson's Workmen's Compensation Law, Vol. 2, Sec. 80.10, as follows:

> "A finding of fact based on no evidence is an error of law. Accordingly, in compensation law, as in all administrative law, an award may be reversed if not supported by any evidence. Conversely, since the compensation board has expressly been entrusted with the power to find the facts, its fact findings must be affirmed if supported by any evidence, even if the reviewing court thinks the evidence points the other way. This statement is, without any close competition, the number-one cliché of compensation law, and occurs in some form in the first paragraph of compensation opinions almost as a matter of course."

At Section 80.20 in his work, Larson goes on to state:

> "The principal corollary of the 'substantial-evidence' rule is the proposition that the reviewing court will not itself weigh the evidence, nor substitute its judgment for that of the commission, even when it is convinced that the weight of the evidence is contrary to the commission's findings."

The burden of proof was on the applicant to show that he suffered an injury arising out of and in the

course of his employment, and the Alaska Industrial Board, after reviewing all the evidence in this case, found that that burden of proof was not met. The learned judge of the United States District Court for the District of Alaska, after carefully reviewing all of the evidence, found that there was substantial evidence upon which the Board based its findings. Unless this honorable court should find that there was no evidence to justify the Board's finding, it is respectfully submitted that the decision below should be affirmed. There was more than ample evidence upon which the Board based its decision.

Mr. Oxford, who had had a prior injury to his back, described the incident of September 4, 1951, in the following manner:

> "A. . . . Well, when I got ahold of one end of this and he got hold of the other, this timber was dry Spruce and it was light and I lifted it up and we moved about 10 or 12 feet carrying it around, sort of sideways—over foot motion—and when I got the screed set down on some saw horses, I told McCurry that I had hurt my back.
>
> Q. In other words, you say that this template was Spruce and was light.
>
> A. Dry Spruce, yes sir.
>
> Q. And it was light?
>
> A. Yes sir.
>
> Q. You told McCurry that you hurt your back after you had set it down.
>
> A. After I set the screed down I said, 'I hurt my back lifting that.'
>
> Q. What happened immediately after the accident? Did you go to the hospital, or what?

A. No. I went back up there—I didn't think I was bad hurt or anything—I went back up on top of the deck, set the screed, and pretty soon McCurry come back up there and it was about 3:00 o'clock in the afternoon, and I stayed on the job until 5:00, which was quitting time, but after we got that screed up there in place, which only had to be this 2x4 carried up and laid down for the steelworkers to hang their steel on, we had about all of our work done for the rest of the day, and I stayed there until 5:00 o'clock, which we'd do in case something else comes up and the steelworkers wants anything to do—anything extra done." (See Tr. 33.)

It is to be noted that there was no unusual incident alleged and that the employee was able to continue with his work for the rest of the day. He merely contends that his back hurt him in lifting up a light piece of dry spruce with another man, work which is certainly normal and usual for a carpenter to perform.

The only other testimony in regard to the alleged injury is in the form of an affidavit submitted by one William McCurry which merely stated that the applicant's account of the incident was true according to McCurry's recollection.

Under cross-examination, Oxford admitted to prior back difficulties while he was employed at Adak approximately two years previous to the above quoted incident. He stated:

"A. I was carrying a 16 foot tank stave on my back and a puff of sudden dust went in and

knocked it off and gave me a slight muscular strain, and my foreman, Mr. Kobaba—he seen me drop the timber and he asked me if it hurt me, and I said, 'Oh, nothing to amount to anything—just a little jerk.' I said 'It will be all right', and he said 'You'd better go and report it', and I went to the office and reported it and they were fixing to take another man down to the infirmary for treatment to an injury that he had, and the man in charge of the First Aid Station told me I ought to go down there and see if they wanted to do anything for me. They never X-rayed me or done anything only give me some tablets or pills, or something or another. The medical officer told me that they would ease pain, and if I needed them to take them, and I don't recall whether I ever took any of them or not. I don't believe I did."

Q. I mean, did you subsequently go back to the infirmary after that initial visit?

A. A day or two later, yes sir.

Q. Why did you go back to the infirmary?

A. The foreman told me to—to check on it.

Q. How were you feeling at that time?

A. Oh, I was feeling all right. The muscles seemed like that they were slightly sore, but I never did go on light work or anything like that. I went ahead with my work, which was heavy work.

Q. I believe you said your back was sore and hurting you a little bit?

A. The muscles, yes sir.

Q. In other words, if you bent over or moved from side to side you could feel it?

A. Yes sir, just more of a muscle strain. It wasn't anything serious. I didn't think it was necessary to go down to the infirmary at the

start, but they said it was the regulations that the Navy had there.

Q. How long did this muscular soreness, or strain, or the nerve or muscle, whatever it was,—how long did that continue? Do you recall?

A. Four or five days." (Tr. 34, 35.)

On the basis of this evidence, the Board certainly was entitled to weigh all the testimony and could well have concluded that there was no accidental injury as required by the Alaska Workmen's Compensation Act, Section 43-3-38 ACLA 1949, which provides:

> "The term 'injury' or 'personal injury' means an injury by accident arising out of and in the course of employment . . ."

This finding of the Board is further bolstered by the Veterans Administration doctors who finally operated on Mr. Oxford. The conclusion of the Veterans Administration report was that a herniation, nucleus pulposus, lumbar, was not found at surgery. In other words, the surgery did not reveal any herniated disc. The actual condition which was found was "unstable lumbosacral joint—treated operated improved." (Tr. 47.) Moreover, Dr. Martini stated as follows:

> "Q. At the time of surgery did Mr. Donald Oxford, the condition of Mr. Donald Oxford, show a ruptured disc?
>
> A. No, it did not." (Tr. 48.)

and

> "Q. In place of a ruptured disc what was found at surgery as far as the diagnosis No. 1 under Final Diagnosis is concerned?

A. So far as encountering at surgery a fresh disc herniation which could be removed as such, we found instead marked instability of the fourth lumbar vertebra and some instability of the fifth." (Tr. 49.)

Dr. Martini testified further:

"A. . . . The presence of the loose vertebral segment as found at surgery we *cannot relate specifically to any injury. Usually it's a congenital sort of thing.* (Emphasis ours.)

Q. In other words, the loose segments themselves are a more or less of a congenital type of thing, is that true, Doctor?

A. That's our opinion." (Tr. 51.)

Dr. Martini also quoted from the clinical report of Dr. Stole which stated in part:

". . . utilizing the standard lumbosacral incision, and the sinous process of L-5 and a part of L-4 was removed. A thorough exploration of the fourth and fifth interspaces was carried out. No pathology was found. It was noted that there was marked instability of L-4 and some instability of L-5. No disc was seen that was abnormal. The operation was then turned over to Dr. Martini for spinal fusion." (Tr. 55.)

From the testimony as quoted above, the Board had ample evidence upon which to reach its conclusion that Mr. Oxford did not sustain an injury arising out of and in the course of his employment. Appellant emphasizes certain portions of Dr. Martini's testimony. It, of course, was up to the Industrial Board to evaluate that testimony and to make its

findings based on it and other evidence. If the testimony is subject to two constructions, an appellate court will adopt the construction placed upon the testimony by the Industrial Board and the testimony quoted above would appear adequately to substantiate the decision reached by the Board.

Moreover, the sections of Dr. Martini's testimony upon which appellant appears to rely would not be regarded as justifying an award under most compensation decisions. In answer to questions by appellant, Dr. Martini stated:

> "A. Well, I certainly think *it's possible* that Mr. Oxford did incur some type of back injury, a lifting mishap.
>
> . . . . . .
>
> A. . . . he *could have* incurred some type of injury.
>
> . . . . . .
>
> A. Anything *could have* happened at that time—we don't know.
>
> . . . . . .
>
> A. *It's conceivable* . . ." (Emphasis ours.) (Tr. 56, 57.)

It is well recognized that such statements as "it's possible", "it could have" "it's conceivable", do not furnish a basis for attributing a disability to an accidental injury and, in many instances, Board decisions based on such testimony have been overruled. See *John H. Green's Case,* 165 N.E. 120, 266 Mass. 355; *Luckenbill v. Philadelphia R. Co. & I. Co.,* 93 Pa.S. 438. But in the subject case it is not necessary to determine whether evidence, when viewed in

its most favorable light, would justify a decision for the appellant. The problem on review is whether or not there was any basis for the Board's decision denying compensation.

In a case closely akin to the one at bar, that of *Mancuso v. Mancuso,* 27 A. 2d 779, wherein an employee alleged a back injury from lifting bags of cement weighing 94 lbs. each, the court held:

> "Claimant's disability is not compensable unless the result of an accident in the course of his employment. Crispin v. Leedom & Worrall Co. et al, 341 Pa. 325, 328, 19 A.2d 400. The burden was on claimant to show by competent evidence that this disability was accidental and not from natural causes or from the normal progress of his condition. Mooney v. Yeagle et al, 107 Pa. Super. 409, 415, 164 A. 82; Gausman v. R. T. Pearson Co., 284 Pa. 348, 354, 131 A. 247; Monahan v. Seeds & Durhan et al, 336 Pa. 67, 71, 6 A.2d 889. It was for the board as the final fact-finding body to determine from all the evidence whether claimant had sustained the burden resting upon him, and its findings that he had not is a pure finding of fact. Frederick v. Berwind-White Coal Mining Co. et al, 115 P. Super. 581, 584, 585, 176 A. 60; Corrento v. Ventresca et al, 144 Pa.Super. 358, 363, 19 A.2d 746. Although the board was not bound to accept the testimony of claimant and his physician (Bakaisa v. Pittsburgh & West Virginia R. Co., Pa. Super., 27 A. 2d 769), their testimony sustains the findings of the board . . .
>
> "Claimant is suffering disability from his present pathological condition, but we agree that the

> record presented to us fails to establish that such disability is due to an accident sustained in the course of his employment rather than from the normal progress of his pre-existing physical condition."

Similarly, in the case of *Matczak v. Goodyear Tire & Rubber Co.,* 139 Ohio St. 181, 38 N.E. 2d 1021, where an employee was lifting bags of lamp black weighing from 25 to 150 lbs., and contended that as he lifted a bag he felt a catch or snap in his back, it was held by the Supreme Court of Ohio:

> "A majority of this court is of the view that the record fails to disclose evidence of an injury accidental in origin and cause. There was nothing unusual about the plaintiff's work except the single fact that one end of the upright bags of lampblack dust was somewhat lower than on previous occasions."

In the case of *Williams v. New Bethlehem Burial Service,* 74 A. 2d 677, 167 Pa. S. 364, an employee contended that he sustained a back injury while lifting the dome of a vault. The court held:

> " 'It was for the board as the final fact-finding body to determine from all the evidence whether claimant had sustained the burden resting upon him, and its finding that he had not is a pure finding of fact . . .' Here, as there, 150 Pa. Super. at page 25, 27 A.2d at page 781: 'Claimant is suffering disability from his present pathological condition, but . . . the record presented to us fails to establish that such disability is due to an

accident sustained in the course of his employment rather than from the normal progress of his pre-existing physical condition.

'Where the triers of the facts refuse to find facts in favor of the party having the burden of proof, the question on review is not whether competent evidence would sustain such a finding if made, but whether there was a capricious disregard of competent evidence in the refusal so to find. Kline v. Kiehl, 157 Pa.Super. 392, 43 A.2d 616.' "

See also:

In Doyle's Case, 269 Mass. 310, 168 N.E. 798;
Wenzel v. J. W. Kiesling & Son, 11 N.Y.S. 2d 877.

In the case of *Palmer v. Knapp Monarch Co.,* 247 S.W. 2d 341 (Mo.), the Board found that the employee did not sustain an accident arising out of and in the course of her employment so as to cause the injury complained of. The appellant claimed that she hurt her back in the act of moving boxes of heavy materials away from a press on which she was employed. The court stated:

"In construing this statute the courts have held that the injury itself does not constitute the 'event' or 'accident' but that in cases of this kind where an employee is injured as a result of exertion in lifting or pulling upon some object, there must be some unusual occurrence, such as a slip, or fall, or abnormal strain as a result of an unforeseen event, in order to bring the person

injured within the coverage of the act. (Cases cited.)"

See also:

Stalling Bros. Feed Mill v. Stovell, 254 S.W. 2d 460, 221 Ark. 541.

In *Lindia v. Walsh-Kaiser Co., Inc.,* 73 A. 2d 765 (R.I.), the employee was operating a larger type Gantry crane and felt a pain in his back while operating the brakes in the ordinary manner. The trial justice held that the injury was not the result of an accident and the appellate court sustained, holding that there was legal evidence to support the findings and stating:

> "It appears from the transcript that petitioner was performing his regular work in the usual manner . . . and that he did not twist or slip or fall. There is no evidence of any unusual condition or abnormal exertion on the part of the petitioner."

In *Morrell v. E. Turgeon Construction Co.,* 68 A. 2d 23, (R.I.), an employee was one of five or six carpenters who were ordered to move a heavy sink. The trial court found that he did not sustain a personal injury by accident arising out of and in the course of his employment, and the Supreme Court of Rhode Island on appeal stated:

> "Therefore, in the instant case, even though a contrary view might be equally reasonable, we cannot disturb the trial court's finding upon conflicting evidence that the petitioner did not sustain an injury to his back by accident."

See also:

Spolidoro v. United States Rubber Co., 50 A. 2d 773, 72 R.I. 269;

Parente v. Apponaug Co., 57 A. 2d 168, 73 R.I. 441, and

Taci v. United States Rubber Co., 58 A. 2d 921, 74 R.I. 113.

In *Caled Products Co. v. Sausser,* 86 A. 2d 904 (Md.), the employee lifted a drum containing liquid soap. As he stooped to pick up a carton he was seized with a severe pain in his back. The X-rays did not reveal any traumatic injury but did reveal an arthritic condition. The claimant underwent an operation. The Court of Appeals of Maryland held:

> "In the case before us there was no unusual condition in the employment when claimant was seized with the disabling pain. The work he was performing was the customary work he had been doing ever since he had started working for the company in 1945."

In the case of *Baston v. Stohr & Fister,* 30 A.2d 640, 151 Pa. S. 618, it was held that the evidence supported the finding of the workmen's compensation board to the effect that the employee did not suffer an accidental injury while carrying a stove between floors, the court stating:

> ". . . the question before the court is whether the board's findings of fact . . . can be sustained without a capricious disregard of the competent evidence. Unless the answer is in the negative, the order must be affirmed."

In *Toohey v. Carnegie Coal Corp.,* 28 A. 2d 362, 150 Pa. S. 297, a coal miner stooped to walk through a trap door leading from one section of the mine to another while carrying a jack and dinner bucket. He alleged that he felt a sharp pain in his hip and upper leg. One doctor testified that he had sustained a sprain of the muscles of his back and concluded that his condition was the result of the "accident". Although the workmen's compensation board had made an award in this case, the appellate court reversed, holding:

> "Under this decision an accident cannot be inferred from an injury alone; there must be other evidence direct or circumstantial. And this court, following this decision, has held that a statement by the claimant that he 'twisted' himself, is not enough."

The Supreme Court of North Carolina had occasion to affirm a decision of its compensation board denying compensation to a cotton mill employee who claimed that she injured her arm and shoulder while stretching sheets. The court concluded:

> "After a review of the entire record and the evidence properly considered by the Commission, we are of the opinion that the findings and conclusions of the Commission were supported by evidence and are binding upon the court. The evidence permits the inferences therefrom which were drawn by the Commission though other inferences appear equally permissible."

See:

> *Johnson v. Erwin Cotton Mills Co.,* 59 S.E. 2d 828, 232 N.C. 321.

In *Thomson v. Garten,* 58 N.E. 2d 942, 115 In. A. 330, a situation very closely analogous to the subject case was involved. An employee was a feed salesman and, in selling feed to a circus, he alleged that he jarred or strained his back in leaving one of the circus cars. Thereafter he received treatment for his back and eventually was X-rayed, disclosing that he had a metastatic carcinoma from which he subsequently died. The appellate court held that there was sufficient evidence to sustain the finding and award of the Industrial Board denying compensation.

In *Buettner v. Industrial Commission,* 59 N.W. 2d 442, 264 Wisc. 516, the claimant sought to recover compensation for a back injury which he alleged was caused by the cranking of a heavy motor at a sawmill. The court stated:

> "We have read the doctor's testimony in its entirety and are of the opinion that the Commission's finding that the incident upon which appellant predicated his injury did not constitute an accident arising out of the employment—is supported by the evidence. It is clear from the doctor's testimony that no one could evaluate the effect of the stress and strain involved in appellant's work with respect to his disability. Dr. Quade himself could make no such evaluation, and while it was obvious that the cranking of the motor *could* cause a disc protrusion, there was no evidence that it actually did. The degenerative condition had existed for months before; appellant had engaged in previous employment which had subjected his back to stresses and strains; he had been employed at the saw-

> mill for less than ten days when the disability occurred. It is clear that, with the condition that appellant's back was in for months prior to the disability, almost any exertion could have caused the disc to protrude. The incident which appellant contends produced the disability cannot be termed 'accidental,' and we find nothing in the record to compel a finding that the disability arose out of appellant's employment."

In *Hubble v. Kold-Hold Mfg. Co.,* 33 N.W. 2d 84, 321 Mich. 567, a claim for a back injury alleged to have resulted from a strain was denied, the court stating:

> "The Commission made the following finding: 'We find that plaintiff did not sustain a personal injury arising out of and in the course of his employment by the Kold-Hold Mfg. Co. on September 6, 1945, and is therefore not entitled to compensation benefits.'
>
> "There is testimony in the record as well as inferences properly drawn from all of the testimony which amply support the above finding of the Commission."

In *Williams v. New Bethlehem Burial Service,* cited supra, a claim for back disability which the employee contended was due to lifting the dome of a burial vault was denied on the ground that the disability resulted from a congenital formation of the back and not from an accident, just as in the subject case Mr. Oxford's disability resulted from a congenital loose vertebral segment rather than to an accidental injury.

Among the numerous decisions upholding compensation boards' denial of claims based on alleged back injuries where no unusual strain, twist or fall was involved, are the following:

Tickles v. E. I. duPont de Nemours & Co., 191 So. 764 (La.);

Waites v. Briggs Mfg. Co., 273 N.W. 441, 280 Mich. 185;

Jack v. International Paper Co., 56 So. 2d 875 (La);

Smith v. Packer Displays, Inc., 67 So. 2d 323 (Fla.).

The Board's finding that Oxford did not sustain an accidental injury arising out of his employment and that his disability was not attributable to any such injury, is clearly borne out by the evidence. An argument may well be made that the evidence, if construed in a different light, might substantiate a contrary finding by the Board. This was a matter peculiarly within the province of the Board's powers and, as indicated by the numerous decisions involving identical circumstances, appellate courts will not reverse where there is evidence upon which the Board based its findings. The list of cases cited above could be expanded to an almost indefinite length but an effort has been made to cite cases dealing with similar disabilities to that involved in the subject case. It is respectfully submitted that there is evidence to substantiate the Alaska Industrial Board's decision affirmed by the United States District Court for the District of Alaska that Oxford did not sustain

an accidental injury in the course of his employment with the Carson Construction Company, and that any disability suffered by him was not attributable to such an injury. In the alternative, it is submitted that since the Board's findings, to the effect that there was no accidental injury arising out of employment and no disability attributable to such injury, are negative ones, they were not made with a capricious disregard of competent evidence; and, accordingly, the decision of the learned judge of the United States District Court should be affirmed.

II.

SINCE OXFORD'S DISABILITY WAS UNRELATED TO HIS EMPLOYMENT, THE BOARD'S DECISION DENYING COMPENSATION SHOULD BE AFFIRMED REGARDLESS OF WHETHER OR NOT OXFORD REASONABLY BELIEVED THAT ANY OPERATION WAS NECESSARY.

Once the conclusion is reached that the Board was justified in its decision that Oxford did not sustain an accidental injury arising out of and in the course of his employment, and that the learned district judge was justified in his decision to the effect that there was substantial evidence upon which the Board based its findings, the other questions raised in appellant's brief become moot. Under no compensation theory could an employer be held responsible for an operation, based on the employee's "reasonable belief" that it was required by an injury, when a decision had been rendered to the effect that the employee

had not suffered an accidental injury arising out of and in the course of his employment.

Counsel devotes most of his brief to discussing common law injury situations, and situations not very closely analogous to the subject case. He cites cases to the effect that an injured person is required to mitigate his damages by securing reasonable medical care. From this, he passes to compensation cases wherein it is held that an employee must submit to reasonable medical treatment. It is submitted, however, that learned counsel is in error in contending that an employee is required to submit to a back fusion operation such as that performed on Mr. Oxford, as the weight of authority appears to hold that an employee cannot be required to submit to such an operation and cannot be prejudiced by reason of his refusal so to do. See *U. S. Coal & Coke Co. v. Lloyd,* 203 S.W. 2d 47, 305 Ky. 105; *Alexander v. Chrysler Motor Parts Corp.,* 207 P. 2d 1179, 167 Kan. 711; *Mietkiewski v. Wayne County Road Comm.,* 198 N.W. 981, 227 Mich. 227; *K. Lee Williams Theatres v. Mickle,* 205 P. 2d 513, 201 Okla. 279; *Gillam v. Workmen's Compensation Appeal Board,* 191 S.E. 204, 118 W.Va. 571; *Sultan & Chera Corp. v. Fallis,* (Fla.) 59 So. 2d 535; *Williams & Copeland, Inc. v. Calvin,* (Okla.) 249 P. 2d 414.

From his statements of law pertaining to mitigation of damages counsel attempts to draw the conclusion that an employee who reasonably believes he is entitled to an operation automatically is entitled to an award for the period of disability resulting

from the operation, regardless of whether or not it develops that the disability revealed at the time of the operation was unrelated to the employment. Certainly this conclusion is a non sequitur, and particularly so under the circumstances of the subject case. The employer in this case authorized one operation and only one operation. That was the operation for a lipoma performed by Dr. Hoge. In authorizing that operation, the employer made it clear that it denied any liability to the employee but that it was authorizing the operation in an effort to amicably settle the dispute. The employee was fully advised by the employer of the employer's position that any disability which was sustained by the employee was not attributable to an accidental injury arising out of and in the course of his employment. After such notification, the employee, on his own initiative, undertook treatment by the Veterans Administration physicians, and it was the employee's decision to secure such an operation after being advised by the employer that, in the employer's opinion, his disability was not attributable to any accidental injury arising out of his employment. The operation established that appellant's condition was due to a congenitial abnormality and, with ample justification, the Alaska Industrial Board concurred with the employer's position that the disability was not attributable to an injury arising out of the employment. The employee endeavors to circumvent this opinion by stating that he reasonably believed the operation was attributable to an injury arising out of and in

the course of his employment and that, accordingly, the disability suffered by the operation should be compensable. It would appear that the statement of this proposition answers itself as, if that were the law, all that would be required for an employee to obtain compensation for conditions totally unrelated to any industrial injury would be for him to maintain that he "reasonably believed" the operation was required by the injury.

In addition to the numerous cases cited by counsel on matters not relevant to the particular point upon which he relies, three cases are cited touching on the proposition that reasonable belief in regard to the needed surgery warrants compensation for disability resulting from the surgery. Of these three cases, only one is really directly in point, and that is the case of *Merriman v. Industrial Comm.,* 210 P. 2d 448 (Colo.). This case was decided by a divided court and involved an appeal from a commission finding in favor of the employee. Had the commission found that the employee had not sustained an accidental injury, or had the commission found that his disability was not attributable to that injury, it is submitted that the appellate court would not have decided in favor of the employee.

The other two cases cited by counsel are the cases of *Vanecek v. Greeley Square Building Corp.,* 104 N.Y.S. 2d 214, 278 App. Div. 869, and *Thomas v. B. & F. Polishing Co.,* 104 N.Y.S. 2d 294, 278 App. Div. 880. Both of these cases involve substantial injuries

to employees requiring exploratory operations. There was no question in either case but that the operation was required as a result of the injury sustained by the employee. The decision in each case is not based on any conclusion that the employee "reasonably believed" that the operation was required by the injury, but rests on much more solid basis to the effect that "the operation was necessitated by the accident." In the *Vanecek* case the "purpose of the operation was to determine the effect of the injury and the surgeon concluded that death resulted from the surgery." The exact same situation was involved in the *Thomas* case.

In the subject case, in contrast to this situation, the operation was not necessitated by any injury sustained by Oxford but was required by a long standing disability attributable to a congenital condition.

In any event, the question as to whether disability resulting from an operation is compensable as having been caused by an injury arising out of and in the course of the employee's employment is one of fact to be resolved by the Board.

> "That the disability or death for which compensation is claimed resulted from a compensable injury is an essential element of the claimant's case, and the burden rests upon the claimant, therefore, to prove such fact by competent evidence. The burden of showing that a pre-existing infirmity or diseased condition was aggravated by the injury complained of rests upon the claimant . . ."
>
> 58 *Am. Jur.* 859.

The Board in the subject case has found that Oxford's disability is not attributable to his alleged accidental injury.

The situation at bar is fairly similar to that of the case of *Newton v. State Industrial Accident Commission* decided by the Supreme Court of California and reported in 267 P. 542. In that case an employee, while running in the course of his employment, felt his knee snap. This resulted in a fracture of the patella of the left knee and there was evidence to the effect that the injury was a spontaneous one and not attributable to any extraordinary strain or trauma. The Industrial Accident Commission held:

> "The evidence does not establish that said fracture was caused by injury or strain arising out of or occurring in the course of his employment."

The California Supreme Court, in affirming, stated:

> "In other words, the finding of the commission is that the injury to the minor resulted from an inherent defect in the patella, although the record does not show any previous diseased condition of the patella, or that the petitioner had experienced any previous trouble therewith. The finding can only be interpreted in the light that the injury resulted from an inherent defect, and not through any extraneous, accidental, or inducing cause, and therefore did not arise out of the course of the minor's employment, or by reason of his employment, but simply occurred during the course of, or time of, employment. It would appear that the theory of the commission was and is that the injury complained of is a matter

which would come, probably, under health insurance, and not under the provisions of 'the Workmen's Compensation, Insurance and Safety Laws.' . . . While the word 'accident' has been eliminated from Sec. 6 of 'the Workmen's Compensation Act' (Stat. 1917, p. 834), the phrase 'arising out of and in the course of the employment' has been interpreted to mean that the injury must result by reason of the employment in which the employee is engaged, and not by reason of some inherent natural defect which simply culminates during the time of employment. In other words, if the agency which culminates in a physical injury is an inherent defect, and not an outside cause, or if the injury is not superinduced by some extraordinary movement or action, compensation is not allowable. Again, as stated in William Simpson Constr. Co. v. Industrial Acc. Commission, 74 Cal.App. 239, 240 Pac. 58: 'In the first place, the burden of proof is upon the applicant to prove that the injury received was one which would sustain an award. "It must be conceded that the burden is upon the applicant for compensation to show that the injury arose out of as well as in the course of the employment; and there is no presumption, as contended by respondents, that because an injury occurs in the course of the employment it arises out of or because of that employment." ' George L. Eastman Co. v. Industrial Acci. Commission, 186 Cal. 587, 200 Pac. 17.

. . . . . .

"Again, (the district court of appeal) is not in a position to draw its own inferences from the

testimony set forth in the record and conclude therefrom that the petitioner is or is not entitled to compensation. Our jurisdiction extends only to the ascertainment of whether there is testimony in the record, and was testimony before the commission supporting its findings.

. . . . . .

"It being a question of fact as to whether the injury to the petitioner arose out of or in the course of his employment, or was simply spontaneous, and occurred during the time of his employment, and that fact being found adversely to the petitioner's contention, and being based upon the expert testimony to which we have referred, supports the findings of the commission, and being a question of fact determined by the commission, cannot be disturbed upon appeal. The only question of law involved herein is as to whether there is any testimony supporting the finding of the commission, and, having found such testimony, our inquiry there stops."

Similarly, in the case at bar, the operation which Mr. Oxford underwent was for a condition which did not arise out of and in the course of his employment with Carson Construction Co. The condition discovered and corrected by means of the operation was a congenital one and, as found by the Alaska Industrial Board, not attributable to any injury of the disc or bony structure. The Board's finding that the operation was not attributable to any accidental injury arising out of and in the course of Oxford's employment with the Carson Construc-

tion Co. is amply supported by the evidence herein, the doctor who performed the operation stating:

> "A. . . . The presence of the loose vertebral segment as found at surgery we cannot relate specifically to any injury. *Usually it's a congenital sort of thing.* (Emphasis ours.)
>
> Q. In other words, the loose segments themselves are a more or less of a congenital type of thing, is that true, Doctor?
>
> A. That's our opinion." (Tr. 51.)

In the case of *Thomson v. Garten* cited supra, where the employee claimed that he jerked or strained his back in leaving a circus car while in the course of his employment and later, after he had been treated for a back disability, it was discovered that he was suffering from a metastatic carcinoma, the evidence was held to sustain the board finding that the cancerous condition was not attributable to the alleged accidental injury and compensation for the death of the employee due to cancer was denied.

Similarly, in *Allen v. Elk City Cotton Oil Co.,* 256 P. 898 (Okla.), it was held that the employer could not be held liable for medical services rendered the employee by a physician other than the one selected by the employer for an ailment other than that resulting from the injuries received by the employee arising out of and in the course of his employment, the court holding:

> "The respondents should not be called upon to pay for the services of the physician rendered claimant for causes not connected with the accident."

In *Citizens Coal Mining Co. v. Industrial Commission,* 135 N.E. 753, 303 Ill. 415, an employee claimed to have sustained an injury in attempting to lift a coal car that was off a track. Approximately seven months later he died as a result of an ulceration and obstruction of the bowels. There was conflicting testimony as to whether this was attributable to the alleged injury. The court held:

> "The evidence does not furnish the basis for a reasonable conjecture that he died from an injury received in the mine."

The problem involved has recently been considered by the United States Court of Appeals for the Fifth Circuit in *Nushinski v. Travellers Ins. Co.,* 190 F. 2d 388. The employee brought suit claiming injury to his lungs alleged to have been suffered while working for a manufacturing company. The Circuit Court held:

> "Concluding as we do that the trial judge was right in concluding that the evidence of causal connection between the claimed injury and the alleged disability was not sufficient to warrant submitting the case to the jury, we need not determine whether the evidence of appellant's wage rate was sufficient to authorize the submission of that issue to the jury."

In *John H. Green's Case,* 165 N.E. 120, 266 Mass. 355, the court held:

> "The fact that the present condition of the claimant might reasonably result from the injury, or that it was conceivable that this condition might

> so result, is not sufficient to justify the conclusion that the condition was causally related to the injury. A mere conjecture or surmise is not proof. There must be evidence to support the finding and the burden was upon the employee to prove his case."

To the same effect is *Kelly v. International Motor Co.,* 205 App. Div. 737, 200 N.Y.S. 804. An employee was operated on for appendicitis and it was discovered that he had a ruptured gastric ulcer which caused his death. Although a physician testified that an accidental injury which the employee had suffered could have caused the condition found, it was held that there was no legal evidence to connect the death with the accidental injury.

A case quite similar to the subject case is that of *Citizens Coal Mining Co. v. Industrial Commission,* 141 N.E. 434, 309 Ill. 473. An employee complained of pain in his back from pushing a car. At the hearing doctors testified that he suffered from an extension of bones of the back attributable to an old infection which had been going on for many years and that the injury was trivial, contributing in no way to the claimant's condition. The commission refused to enter an award for the employee and this decision was affirmed on appeal, based upon the fact that the disability was from a long standing condition causing gradual changes in the spine so that the alleged accident was neither an original or aggravating cause of the applicant's disability.

Another case closely akin to the subject case on its facts is that of *Rosenkranz v. Industrial Commission,* 262 P. 1014, 83 Colo. 123. The claimant was suffering from arthritis of the spine which, according to the medical evidence, would sooner or later produce death. Although there was evidence which, if believed, would have justified a finding that, in addition to the disease, there was a temporary disability caused by a sprain of the sacroiliac joint, the court held that there was no evidence which would compel such a finding and that the sprain caused by lifting could have been a trivial matter, not enough to cause disability in that the progress of the disease could have culminated when it did without the strain.

Even the most liberal authorities on workmen's compensation cases hold that there must be a showing that a disability is caused by the alleged industrial injury before compensation will be allowed. The triers of fact in the subject case have found an absence of such causal relation, the Board having concluded that the disability was not related to an accidental injury arising out of and in the course of employment. This finding of the Board was based on substantial evidence and it is respectfully submitted that that finding cannot be said to have been made with a capricious disregard of the competent evidence. Accordingly, it is respectfully submitted that this learned court should affirm the decision of the Alaska Industrial Board, as did the learned judge of the United States District Court.

CONCLUSION.

There was no showing by Oxford of any accidental injury arising out of and in the course of his employment since the most that his testimony indicated was that he stated that his back hurt while performing his normal work in the normal manner. The evidence indicated that the disability from which Oxford suffered was not attributable to any injury but was due to a long standing degenerative condition together with a congenital instability of the back. There being substantial evidence on which the Board found that there was no accidental injury arising out of Oxford's employment and that Oxford's disability was not attributable to any such accidental injury; and such finding not having been made with a capricious disregard of competent evidence, it is respectfully submitted that the decision of the court below should be affirmed.

Dated, Juneau, Alaska,
March 29, 1955.

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